Supreme Court, U. S.
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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1979

No. 79-1085

KATHRYN LUMPKIN,
Petitioner,

VS.

CITY OF LITTLE ROCK,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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PETITION FOR CERTIORARI

The petitioner Kathryn Lumpkin respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on October 17, 1979.

OPINIONS BELOW

The opinion of the Court of Appeals, reported at _____ F2d _____ (8th Cir. 1979), is attached hereto as Exhibit A.

The unreported decisions of the United States District Court for the Eastern District of Arkansas, dated 3-5-79 is attached hereto as Exhibit B.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on October 17, 1979. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254 (1).

QUESTION PRESENTED

Is the doctrine of municipal immunity constitutional when it acts as an absolute bar to tort liability?

STATEMENT OF THE CASE

This case was filed in the United States District Court, Eastern District of Arkansas, Western Division, on November 30, 1976. The jurisdiction of the district court was invoked because of the diversity of citizenship among the parties. In response to plaintiff's complaint, the City of Little Rock filed a motion to dismiss pursuant to Rule 12 (b) alleging that the plaintiff had failed to state a cause of action. The trial judge granted this motion to dismiss filed by the defendant in an order of March 5, 1979, (see Appendix B), on the basis that the City of Little Rock is an incorporated municipality and is, therefore, absolutely immune from tort liability under the laws of Arkansas. This case was then appealed to the 8th Circuit Court of Appeals which affirmed the District Court's decision in an opinion of October 17, 1979, (See Appendix A).

As alleged in her pleadings, the plaintiff, Kathryn Lumpkin, when she was approximately three years old, was hideously burned while playing in the front yard of her parents residence which was located, on the day in question, in the City of Little Rock. She further alleged that the City of Little Rock was involved in street repairs on the street in question and that the city's employees and agents left "smudge pots" containing extremely hot, and flammable oil on her premises where she was playing. The infant petitioner came in contact with same resulting in serious and catastrophic injuries as a result of second and third degree burns which she suffered over approximately 50% to 60% of her body.

The plaintiff alleges that the defendant, City of Little Rock, through its employees was negligent in failing to supervise the "smudge pots," in failing to warn occupiers and residents of the area in which the street repair was being carried out as to the dangers inherent in the "smudge pots," in failing to put the "smudge pots" in a safe place where there was no reasonable expectation that children should come in contact with same, in failing to put the "smudge pots" in reasonably safe containers, and in allowing the "smudge pots" to be unattended while lit on the day in question, and to otherwise properly supervise its employees and agents in the proper use and maintenance of these extremely dangerous "smudge pots." As a result of these injuries, the plaintiff filed suit for permanent disfigurement, pain and suffering, mental anguish, and past and future medical expenses.

REASON FOR GRANTING THE WRIT

The issue in this case involves the denial and infringement of a fundamental right of the petitioner by the State of Arkansas. The petitioner, Kathryn Lumpkin, was grievously injured through the negligence of the employees of the City of Little Rock, an incorporated municipality, that now seeks to shelter itself from liability through the doctrine of sovereign immunity. (See *Sullivan v. Pulaski County*, 247 Ark. 259, 445 S.W.2d 94 [1969]). See also Ark. Stat. Ann. 12-2901, 2902, 2903 [cum. supp. 1977]). No remedy has been afforded the petitioner of any kind, either administrative or quasi-judicial, and the petitioner now maintains that the granting of absolute immunity to the City of Little Rock by the State of Arkansas is a denial of due process and equal protection of the 5th and 14th Amendment to the Constitution of the United States.

Without question, the petitioner has been grievously injured without having been afforded any redress or remedy whatsoever. Therefore, petitioner, Kathryn Lumpkin, asserts that this denial of access to the courts is, in effect, an infringement upon her constitutional right to due process and is a denial of "life, liberty and property." In *Boddie v. Connecticut*, 401 U.S. 371, 91 S.Ct. 780 at 785 (1971), the Court reviewed this problem:

> . . . Thus, this Court has seldom been asked to view access to the Courts as an element of due process. The legitimacy of the State's monopoly over techniques of final dispute settlement, even where some are denied access to its use, stands, unimpaired *where recognized effective alternatives for the adjustment of differences remain.* (Emphasis added).

In the case under consideration, the State has exercised its "monopoly over techniques of final dispute settlement" by denying the petitioner not only a cause of action against the City, but failed to provide any "effective alternatives" through judicial or quasi-judicial means. This is tantamount to a denial of due process, e.g., "access to the courts," since the State of Arkansas has effectively taken the petitioner's "life, liberty or property" from her by denying her the full use and enjoyment of her body as a result of its negligence. The Court has strongly implied that the validity of so-called municipal immunity is questionable and has intimated that the entire doctrine is open to review. (See *Salt Lake City v. Hollister*, 118 U.S. 256, 6 S.Ct. Rep. 1055 [1886] and *Monell v. New York City Dept. of Social Service*, 98 S.Ct. 2018 [1978]). In the *Monell* case the Court held that municipalities were not immune from tort liability arising out of civil actions filed under 42 U.S. Code 1983, however, the Court went on to say at Page 2041:

> [le] Since the question of whether local government bodies should be afforded some form of official immunity was not presented as a question to be decided on this petition and was not briefed by the parties nor addressed by the courts below; we express no views on the scope of any municipal immunity beyond holding that municipal bodies sued under §1983 cannot be entitled to an absolute immunity, lest our decision that such bodies are subject to suit under §1983 'be drained of meaning,' *Scheuer v. Rhodes*, 416 U.S. 232, 248, 40 L.Ed.2d 90, 94 S.Ct. 1683, 71 Ohio Ops.2d 474 (1974). Cf. *Bivens v. Six Unknown Federal Narcotic Agents*, 403 U.S. 389, 397-398, 29 L.Ed. 619, 91 S.Ct. 1999 (1971).

Obviously, the State of Arkansas cannot demonstrate a "compelling state interest" in denying the petitioner, or other petitioners likewise situated, access to

the courts. This denial has visited an incredible injustice upon the petitioner and there exists no rational basis for not allowing the petitioner some form of remedial procedure that she could pursue against the City of Little Rock. Further, the petitioner would urge that the Court review the status of municipal immunity as it applies in all civil cases vis-a-vis the more restricted view of the law as it exists in light of the *Monell v. New York City Dept. of Social Service* (supra). Moreover, in harmony with *Boddie v. Connecticut* (supra) the petitioner would urge that the Court hold that the denial of access to the courts that has occurred in this case be held as an infringement upon the petitioner's fundamental right to due process.

The petitioner also asserts that the denial of access to the courts by the State of Arkansas was violative of the equal protection clause of the 5th & 14th Amendment to the U.S. Constitution. The State of Arkansas rectified the sovereign immunity problem by providing a forum for tort liability claims against the State by means of a State Claims Commission. See Ark. Stat. Ann. 13-1401. However, no such procedure was created for municipalities. This was done by the State of Arkansas prior to the date of the petitioner's injury, and the petitioner would strongly urge that the failure of the State of Arkansas to likewise create a remedy for that classification of people who were injured through the alleged negligence of municipalities constituted a denial of equal protection. No rational basis can exist for the classification thus created. That is to say, the State of Arkansas having created a remedy for those persons injured through the negligence of the State of Arkansas should, likewise, have created a remedy for those persons injured through the negligence of municipalities which in Arkansas are merely creatures of the State.

The petitioner submits that the case in question provides the Court with an opportunity to resolve important questions concerning the issue of municipal immunity, access to the courts as a fundamental right, and further establish the parameters of due process that State's must provide petitioners in civil cases likewise situated.

CONCLUSION

For these reasons a writ of certiorari should issue to review the judgment opinion of the 8th Circuit.

Respectfully submitted,

PHILLIP H. McMATH
711 West Third Street
Little Rock, Arkansas

Counsel for Petitioner

EXHIBIT A

United States Court of Appals
FOR THE EIGHTH CIRCUIT

No. 79-1235

Katherine Lumpkin, *
*
Appellant, *
* Appeal from the United
v. * States District Court for
* the Eastern District of
City of Little Rock, * Arkansas.
*
Appellee. *

Submitted: October 9, 1979
Filed: October 17, 1979

Before LAY, HEANEY and HENLEY, Circuit Judges.

PER CURIAM.

Katherine Lumpkin appeals from the District Court's dismissal of her tort complaint against the City of Little Rock, Arkansas. She contends that the District Court erred in holding that the municipality is immune from suit under Arkansas law. Her complaint in this diversity action states that she was severely burned in 1958 [1] by the City's

1. Plaintiff, who was three years old at the time of her injury, filed her complaint the day before her twenty-first birthday.

negligent placement of "smudge pots" containing hot oil near her home. The City moved to dismiss under Fed.R.Civ.P. 12(b)(6). The District Court [2] issued a memorandum and order dismissing the complaint because, under Arkansas law [3] on the date of the injury, tort actions against cities were barred by the doctrine of municipal immunity. We affirm the District Court's dismissal on the basis of its memorandum.

Lumpkin also challenges the constitutionality of the Arkansas sovereign immunity doctrine. We find no merit in the challenge.

The order of the District Court is affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

2.
Honorable G. Thomas Eisele, Judge, United States District Court, Eastern District of Arkansas, Western Division.

3.
The parties agreed that Arkansas law was applicable to the action.

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

KATHRYN LUMPKIN, PLAINTIFF,	)	
V.	)	LR-76-C-390
CITY OF LITTLE ROCK, DEFENDANT,	)	

MEMORANDUM AND ORDER
(Filed in U.S. District Court March 5, 1979)

This is an action for damages, arising from an accident occurring in April, 1958. The plaintiff, then two years old, alleges that her injuries were caused by the negligence of employees of the City of Little Rock, Arkansas, in failing to place "smudge pots" in a safe place at a street repair site. Before the Court is the motion to dismiss of the City of Little Rock, the sole defendant in the action. The motion will be granted, and the cause dismissed.

The parties agreed that Arkansas law is applicable in this action. The defendant relies on the common law doctrine of tort immunity for municipalities, codified at Ark. Stat. Ann. §12-2901 (cum supp. 1977) (1969 Ark. Acts No. 165). The plaintiff asserts that under Arkansas law at the time of the accident, the Arkansas Supreme Court would have overruled its prior decisions adhering to the immunity doctrine. Alternatively, the plaintiff suggests

that the Arkansas Supreme Court would have held maintenance of city streets to be a proprietary function for which a city could be held liable in a tort action.

Apart from the brief divergency of *Parish v. Pitts*, 244 Ark. 1239 (1968), Arkansas has adhered to the doctrine of municipal immunity. Only a year prior to the date of the plaintiff's injury, the Arkansas Supreme Court reaffirmed its position on the immunity of the state and its political subdivisions. *See St. Francis Drainage District v. Austin*, 227 Ark. 167 (1957); *Cabbiness v. City of North Little Rock*, 228 Ark. 356 (1957); *Kirksey v. City of Ft. Smith*, 227 Ark. 630 (1957). In the latter decision the court declined to alter existing law, but suggested the need for legislative action to correct the inequities created by municipal immunity. Over ten years later, in *Parish, supra*, no legislative action having been taken in the interim, the Arkansas Supreme Court overruled its previous decisions, and abolished the doctrine of municipal immunity. This result, however, was not to be applied retrospectively. *See id.*, at 1254. Almost immediately, the legislature reacted by enacting legislation to revive municipal immunity, 1969 Ark. Act. 165, which has since been applied to accidents occurring before the effective date of the Act. *See, g., Sullivan v. Pulaski County*, 247 Ark. 259 (1969). In Sullivan, the court noted that even in the absence of the statute, had the accident occurred in a city, there would have been no cause of action, inasmuch as the accident occurred before the effective date of *Parish. Sullivan, supra* at 261.

The plaintiff cites substantial authority criticizing the immunity doctrine. *See, e.g., Muskopf v. Corning Hospital District*, 11 Cal. Rptr. 89, 359 P.2d 457 (1961); Leflar and Kantrowitz, *Tort Liability of the States*, 29

N.Y.U.L. Rev. 1363 (1954). The role of this Court in a diversity action, however, is to apply applicable state law. *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938). There can be no doubt that an Arkansas court now considering this matter would be constrained to apply the doctrine of municipal immunity as the law applicable to a cause of action arising in 1958.

Likewise, it is clear that, under Arkansas law, the maintenance of city streets is treated as a governmental function. Suits against municipalities arising from such governmental functions are barred by municipal immunity. *See, e.g., Collier v. Fort Smith*, 73 Ark. 447 (1904); *Arkadelphia v. Windham*, 49 Ark. 139 (1886). While this stands at loggerheads with the rule accepted in other jurisdictions, *see* W. Prosser, *Law of Torts* §24 at 778 (2d ed. 1955), it is in keeping with the definition of governmental functions generally adopted by the Arkansas Supreme Court. *See, e.g., Cabbiness, supra* (municipal swimming pool); *Kirksey, supra* (municipal airport); *Patterson v. City of Little Rock*, 202 Ark. 189 (1941) (waterworks).

It is therefore Ordered that this action be, and it is hereby dismissed.

Dated this 5th day of March, 1979.

/s/ G. Thomas Eisele
United States District Judge

Supreme Court, U. S.
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BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion delivered in the Court below is not as yet officially reported, but is appended to the Petition for a Writ of Certiorari. The opinion was delivered on October 17, 1979.

JURISDICTION

Respondent does not question the jurisdiction as set forth in the Petition.

QUESTION PRESENTED

Petitioner's issue is not the issue presented to the Trial Court nor is it the issue dealt with by the Court of Appeals. The issue decided by each of those Courts was whether Arkansas law barred tort actions against Arkansas cities at the time the Petitioner's alleged cause of action arose in 1958. As such, Petitioners issue does not encompass a federal question requiring this Court's scrutiny.

STATEMENT OF THE CASE

This action was filed in the U.S. District Court, Eastern District of Arkansas, Western Division, on November 30, 1976. The Petitioner alleged that in 1958, she had been burned by smudge-pots placed on or about her property during the Respondent's work on a nearby street. The Petitioner further charged that the City of Little Rock, through its agents and employees, could be sued under theories of negligence and strict liability. The Respondent City moved to dismiss pursuant to Rule 12 (b) contending that Arkansas law was one of sovereign immunity. The Petitioner, in a reply brief, countered that in 1958 Arkansas did not embrace the law of sovereign immunity and that had the Arkansas Supreme Court decided the matter at that time it would have so held.

The District Court disagreed, finding that the law in Arkansas in 1958 was clearly one of sovereign immunity and dismissed the Petitioner's claim. The Petitioner appealed, and in a *per curiam* opinion the Court of Appeals upheld the District Court's findings.

ARGUMENT

The Petitioner's streamlined, and somewhat simplified, presentation of the question in this matter does not fully or accurately present the issue as it developed before the Court of Appeals. At the trial level, the Petitioner argued that this case should turn on how the Arkansas Supreme Court would have decided this case twenty years earlier. In committing to this tack, the Petitioner necessarily stipulated that Arkansas law did, indeed, apply in this instance. When the Trial Court decided adversely to the Petitioner, an appeal ensued with the Petitioner charging, *inter alia*, that the law under which relief was sought violated the Fourteenth Amendment of the Constitution, and that it further violated her fundamental right of access to the courts.

Now, before this Court, the Petitioner's characterization of the issue takes this matter even further from the original question the Trial Court was asked to decide. Indeed, a comparison of the issue framed for the Trial Court by the Petitioner (Brief in Support of Response to Motion to Dismiss, at page 2), with the Petitioner's current statement of the issue reveals what appears to be two completely separated and distinct lawsuits.

The aberration of the issue took place, of course, at the Court of Appeals where the Petitioner first sought to have the questions of equal protection and access to the Court considered.

At that point, the Respondent contended that such arguments, raised for the first time on appeal, could not be considered. The Petitioner then charged that the arguments had been raised (and presumably explored) at the trial level by virtue of a one sentence statement contained in a trial brief. Specifically, on page seven of an eight page argument, the Petitioner had stated, almost as an afterthought, or to tie together loose ends, that the law also " . . . violated the equal protection and due process clauses of the U.S. Constitution." No particular analysis, explanation, justification, illustration, supportive reasoning, or even bar-room argument was advanced to shed light on this hypothesis. It was simply plugged into the brief like one plugs in an extra wall socket in the event more voltage is needed.

At the appeal level, however, the Petitioner took pain to compare the Arkansas law under attack to a 1974 South Carolina law that apparently separated redress for injuries suffered in motor vehicle accidents from other types of injuries. The thrust of this analysis was that Arkansas law also created classifications which required study. The Petitioner next attempted to demonstrate that a fundamental right of access to the courts existed, and that she had been denied that right.

In support of this latter argument, the Petitioner relied heavily upon language found in *Boddie v. Connecticut*, 401 U.S. 371 (1971). This case, the South Carolina law mentioned above, and the other authorities relied upon on appeal, however, (with the single exception of *Monell v. New York City Dept. of Social Services*, 98 S.Ct. 2018 (1978), mentioned in a letter to the Trial Court) were not submitted until appeal.

The Petitioner's excursion into this territory, then, was clearly taken without the company of the Trial Court and therefore should not now be given *de novo* consideration by this Court. This much is clear from the consistent line of cases holding that issues not presented to the Trial Court cannot find their way into Appeals Courts. In *Katsev v. Coleman*, for example, 530 F.2d 176 (8th Cir. 1976), the Court granted summary judgment to the Appellee based on facts stipulated by both parties. On appeal the Appellant (plaintiff) alleged that there were other facts that it had tried to present as additional evidence to the trial court after entering into stipulations. The trial court had denied this request. On appeal the court refused to consider those matters not addressed by the trial court. Specifically, the court stated that "(t)hat allegation was not considered by the District Court. We have reviewed the *complaint* . . . and find no foundation for the claim . . . *Thus, . . . the claim cannot be asserted on appeal.*" Id. at 180. (Emphasis added) Likewise, the court in *Hunt v. Pan American Energy, Inc.*, 540 F.2d 894 (8th Cir. 1976), in responding to issues raised for the first time on appeal, stated:

> Whether possession by the Ballantynes of Hunt drill hole locations and identification numbers, assuming their use in the purchasing of leases, would support the imposition of a constructive trust under North Dakota law is an issue we need not decide. *The Hunts' complaint* and the trial to the court below *did not encompass this theory. It cannot be asserted for the first time appeal. Katsev v. Coleman*, 530 F.2d 176, 180 (8th Cir. 1976). (Emphasis added)

This principle was also recognized in *Mid-Continent Petroleum Corp. v. Keen*, 157 F.2d 310 (8th Cir. 1946); and *Werner v. United States Dept. of Interior*, 581 F.2d 168, 181

(8th Cir. 1978). In *Werner*, the court was emphatic in its refusal to hear arguments raised for the first time on appeal:

> Finally, appellants argue that 28 U.S.C. Sec. 1361 (the mandamus statute) and 28 U.S.C. Sec. 1331 (the federal question statute) confer jurisdiction for the equitable relief they seek. These arguments were not made to the district court and will not be considered on appeal. *Katsev v. Coleman*, 530 F.2d 176, 180 (8th Cir. 1976); *Brennan v. Maxey's Yamaha*, 513 F.2d 179, 184 (8th Cir. 1975); *Prairie Band of Pattawatomie Tribe of Indians v. Puckkee*, 321 F.2d 767, 770-71 (10th Cir. 1963).

Finally, in *Walters v. City of St. Louis, Mo.*, 347 U.S. 231, 233 (1954), this Court stated that " . . . we will not undertake to review what the Court below did not decide." What could be more clear or more on point? The issue the Petitioner seeks to thrust upon this Court was not the issue which determined the outcome of this case below and accordingly, it should not determine the outcome of the Petition now before this Court.

CONCLUSION

Based on reasons set forth the Respondent states that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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BY: ROBERT T. TAYLOR

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